FOR ARGUMENT

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Supreme Court of the United States

OCTOBER TERM 1975

No. 75-1707

OHIO BUREAU OF EMPLOYMENT SERVICES

AND

ALBERT G. GILES,

Appellants,

vs.

LEONARD PAUL HODORY,

Appellee.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

REPLY BRIEF OF APPELLANT

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ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

REPLY BRIEF OF APPELLANT

A. Appellee Has Demonstrated No Federal Right to Unemployment Compensation.

Appellee-Plaintiff here and in the court below has argued that the Ohio labor dispute disqualification as it appeared in 1974-75 served to deprive them of due process of law thus violating their 14th Amendment rights. As this court is well aware, a claim based upon due process is actionable only if there is the allegation of the deprivation of a constitutionally

secured or protected right. This means that "due process" is the vehicle by which other federal constitutional rights are protected. Thus a court in its examination of an alleged due process deprivation does not automatically achieve subject matter jurisdiction upon the utterance of the magic words "due process", but must inquire whether the alleged due process deprivation involves a fundamental or constitutionally protected right. In *Paul* v. *Davis*, 96 S. Ct. 1155 (1976) and *Kelley* v. *Johnson*, 96 S. Ct. 1440 (1976), this court recognized that due process does not extend to every perceived inequity allegedly suffered at the hands of the state but, rather, it applies only where there is involved an underlying federal or constitutional right, which unemployment compensation is not.[1] In *Paul* v. *Davis*, *supra*, at 96 S. Ct. 1160, this court recognized that the 14th Amendment of the U.S. Constitution can be applied *only* in the presence of an *express federal right*. This court then referred to the case of *Monroe* v. *Pape*, 365 U.S. 167, 81 S. Ct. 473 (1961) saying that it had been actionable on 14th Amendment grounds only because it involved an infringement of the plaintiff's 4th Amendment rights. This court in *Paul* v. *Davis* then reapplied that reasoning and found no merit to the plaintiff's claim because he had pointed to "no specific constitutional guarantee safeguarding the interest he asserts."

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[1] Recently this court in *Lavine* v. *Milne*, 96 S. Ct. 1010 (1976) addressed an analogous situation. In *Lavine*, *supra*, this court had before it an appeal from a three-judge district court which had declared certain provisions of the New York welfare laws unconstitutional under the 14th Amendment and 42 U.S.C. 1983. In reversing the three-judge panel, this court stated at 96 S. Ct. 1015 N. 9 citing *Dandridge* v. *Williams*, 397 U.S. 471, 90 S. Ct. 1153 (1970) that "Welfare benefits are not a *fundamental right*, and neither the State nor Federal Governments are under any sort of constitutional obligation to guarantee minimum levels of support." (Emphasis added) This decision came on the heels of this court's earlier decision in *Mathews* v. *Eldridge*, 96 S. Ct. 893 (1976) in which this court intimated that Social Security payments were even less necessary than welfare payments. Thus, it must be concluded that State Unemployment Benefits which are matters of state discretion, are also less necessary than the welfare payments which this court stated were not of a fundamental right nature.

In the instant case, Appellee's due process arguments, here and below, can be deemed viable only if Appellee-Plaintiff can point to some authority establishing a federal, as opposed to a state, substantive right to unemployment compensation benefits upon the facts asserted. So far, Appellee has failed to do so. (See Transcript Pg. 45-46) Appellee-Plaintiff's argument here and below proceeds on the theory that 42 U.S.C. 502 and 503, and 26 U.S.C. 3304 somehow magically create a hitherto undiscovered federal right to unemployment compensation while unemployed due to a labor dispute. They do not.

42 U.S.C. Section 501-503 sets forth certain procedural requirements of notice and hearing that must be complied with if a state is to receive federal funds for the administration of its program. 42 U.S.C. 501-503 *does not* set forth any substantive law requirements, *does not* provide federal money for the payment of benefits, and *does not* create any fundamental right to unemployment compensation. Although 26 U.S.C. 3304 comes somewhat closer to creating substantive rights to state unemployment benefits, it stops short of that stating instead, that individuals seeking work cannot be forced to become "strike breakers" or accept worse working conditions than they previously had. 26 U.S.C. 3304, like 42 U.S.C. 503, *does not* by implication create any federal right to unemployment compensation while unemployed due to a labor dispute.[2] As stated initially in Appellant's brief, p. 24, 42 U.S.C. 303, 501, and 503

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[2] When Congress desired to authorize unemployment compensation to employees who became "unemployed" as a result of a labor dispute, it has done so expressly. In 1938 Congress removed railroad workers from the unemployment compensation provisions and in section 204(a-2)(iii)[45 U.S.C. § 354(a-2(iii)] of the Railroad Unemployment Insurance Act created a federal reserve of payments to these workers while on strike *if* their strike was not contrary to the Railway Labor Act (44 Stat. 577 (1926), 45 U.S.C. §§ 151 et seq.) or union rules.

(Footnote continued on following page)

give rise only to *procedural* rights the violation of which may properly be a 42 U.S.C. 1983 action. [See *California Department of Human Resources Development* v. *Java*, 402 U.S. 121 (1971)] However, the instant case does *not* involve any alleged deprivations of *procedural* rights and thus contains no valid assertion of any federal or constitutionally protected right.

Appellee in its answer brief has attempted to demonstrate some sort of "common law" right vindicated in various cases which it cites. However, in none of the cases cited by Appellee is there any indication of any fundamental or constitutionally protected right of unemployment compensation such as would trigger 14th Amendment protection and thus the cases cited by Appellee are distinguishable. In *Turner* v. *Department of Employment Security*, 423 U.S. 44 (1975), *Sherbert* v. *Verner*, 374 U.S. 398 (1963) and *Lincoln* v. *True*, 408 F. Supp. 22 (1975) cited by Appellee at p. 21 of Appellee's brief, there was an underlying fundamental right involved that was unrelated to unemployment compensation: namely, the First Amendment, which is not present in the instant case. In *Bowen* v. *Hackett*, 361 F. Supp. 854, (1973) there was a recognized suspect classification: namely, sex, which is likewise not present in the instant case. Thus, the only right in issue in the instant case, the

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(Footnote continued from preceding page)

This legislative change, to create an economic incentive for railroad workers to support the peaceful resolution of labor disputes and to discourage resort to "wildcat" strikes in an industry vital to the public interest (*Bhd. of Railway Clerks* v. *Railroad Retirement Bd.*, 239 F.2d 37, 42-3 (D.C. Cir. 1956), did not signal a broad congressional design or desire to create unemployment compensation for workers in other industries who might be laid off as a result of a labor dispute. Congress desired only to add this incentive to protect interstate commerce from interruption of vital transportation services. This Court has cautioned against drawing inferences from this legislation. "Both its history and the interests it governs show the Railway Labor Act to be unique." *Whitehouse* v. *Illinois Cent. R.R.*, 349 U.S. 366, 371 (1955).

right to unemployment, if a right at all, is one wholly of *state origin* and the court below erred in finding this case appropriate material for a 42 U.S.C. 1983 action. (See *Dorsey* v. *N.A.A.C.P.*, 402 F. 2d 1022 [C.A. La. 1969] cert. denied, 90 S. Ct. 58, 396 U.S. 847 and *Ortega* v. *Ragan*, 216 F. 2d 561 [C.A. Ill.] 1954 cert. denied, 75 S. Ct. 786, 349 U.S. 940.)

Appellee cites, quite correctly, that certain administrative functions of the Ohio Act are financed by and under the Federal Social Security Act 42 U.S.C. 501-503 and Federal Unemployment Tax Act 26 U.S.C. 3304. Appellee, however, jumps to an unwarranted conclusion when he states at p. 6 that the "Ohio unemployment compensation system is 'governed' by the Federal Social Security Act and FUTA." Such is not the case. Appellant's brief at p. 24-31 sets forth with clarity the fact that each state is free to "govern" its own system and to tailor its program to its own particular needs.

In this context, it is significant that even the Federal Government, via Internal Revenue, acknowledges that each state is to be free to establish whatever program it, the state, desires. Rev. Ruling 75-87 I.R.B. 1975-11, 15 states that the purpose of this Act (Title IX of the Social Security Act, Pub. L. No. 27) [74th Cong.] was *not* to set up a Federal unemployment compensation system but "What it seeks to do is merely to make it possible for the states to establish unemployment compensation systems and to stimulate them to do so."

Appellee, in his attempt to find a conflict between Ohio and Federal law, fails to address two other major issues in that he ignores the fact that the funding received from the Federal Government can be refused by the State and, if accepted, is still not used for benefit payments but for program administration. Although the Federal Government no doubt can impose contractual conditions precedent to the receipt of this money, they as yet have not required that it be paid under circumstances like those in the instant case and, thus, have created no right on

these facts. Secondly, the Appellee has failed to explain why the Secretary of Labor has consistently approved the Ohio program for federal funding if it is as "contrary" to federal law as Appellee claims it is.

This court should consider well the possible ramifications that could flow from a finding in this case that federal substantive rights inhere in a state unemployment compensation system. Such a finding might possibly lead to federal court litigation of an untold number of unemployment benefit cases, a matter clearly not contemplated by the "arising under" language of the U.S. Constitution.

B. A Holding that the Social Security Act Requires Coverage of Those "Unemployed Due to a Labor Dispute", a Group Specifically Excluded Under Ohio Law, Would Be An Unconstitutional Infringement Upon the Sovereignty of the State and Violate the 10th Amendment of the U.S. Constitution.

The basic structure of the Federal-State unemployment compensation program has remained unchanged since the enactment of the Social Security Act on August 14, 1935. In Title IX of that act, a payroll tax of 3 percent was laid on private sector employers. A credit of up to 90 percent of the tax, or 2.7 percent, was allowable for contributions paid into a State unemployment fund, under a State unemployment compensation law found to meet the conditions for approval set out in Title IX. A State which had an approved unemployment compensation law could apply, under Title III of the act, for grants of funds to assist the State in the administration of its law; the payment of such grants would be certified upon a finding that the State law contained the further provisions required by Title III. The provisions on grants remained in Title III of the Social Security Act, 42 U.S.C. 501 et seq., while the taxing provisions are in the Federal Unemployment Tax Act, Chapter 23 of the Internal Revenue Code of 1954, 26 U.S.C., 3301 et seq. The requirements for State unemployment compensation laws are set out in 42 U.S.C. 503 (a) and 26 U.S.C. 3304 (a), respectively.

For the first 37 years of this cooperative program, no provision of the Federal statutes required the States to cover any specific class of persons or employees. Inducement or persuasion of State law coverage was founded on the tax credit in the Federal Unemployment Tax Act. Credit against the Federal tax was based on contributions into a State unemployment fund on the same payroll, and coverage of the State law was based on the payroll subject to contributions. In this way, State law coverage for compensation purposes was generally as broad as the tax coverage of the Federal Unemployment Tax Act, although the States retained the authority to adopt more restrictive coverage or expand coverage beyond the inducement provided by the Federal law. It was under this method of operation that this court in *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 57 S. Ct. 883 (1937) found that the states were not coerced and that the Federal State Cooperative venture was constitutional.

Starting in 1970, Congress began imposing new requirements as conditions precedent to receiving federal funding, however none of those requirements affect the rights of Appellee herein.

Appellant knows of no attempt to date to challenge the imposition of such requirements on 10th Amendment grounds; however, in view of this court's recent decision in the *National League of Cities* v. *Usury* (No. 74-879) U.S. 49 L. Ed 2d 245, 96 S. Ct. (1976), there is now some question concerning their constitutionality.

Although Appellant strongly feels that no federal right to unemployment is created by either or both of 42 U.S.C. 501-503 and 26 U.S.C. 3304, it must be considered that if this court finds that 42 U.S.C. 503 and 26 U.S.C. 3304 do, in fact, impose substantive law requirements that benefits be paid by the State to people clearly not covered by the State's unemployment

insurance law, then 42 U.S.C. 503 and 26 U.S.C. 3304 infringe upon the sovereign right of the State of Ohio to formulate its own program of unemployment insurance and, thus, violate the 10th Amendment.

This court has stated on several occasions that Congress may not constitutionally infringe upon the State's reserved powers and has stated recently that Congress may not "displace the State's freedom to structure integral operations in areas of traditional government functions . . ." *(National League of Cities* v. *Usury, supra,* Slip Opinion at 18) In *National League of Cities* v. *Usury,* this court held that the federal extension of mandatory coverage under the minimum wage and overtime provisions of the Fair Labor Standards Act (29 U.S.C. § 201) to employees of State and local government violated the 10th Amendment by infringing upon the State's reserved powers (Slip opinion 17-18). Similarly, any federal coercion to "cover" or pay benefits to those clearly excluded by the State unemployment insurance law would also violate the 10th Amendment by usurping the State's power to decide for itself whom it should elect to "cover" and what types of unemployment it will compensate.

Although the 10th Amendment to the U.S. Constitution is but infrequently invoked to protect the ability of a State to conduct its own programs, such invocation is not without precedent.

In *National League of Cities* v. *Usury, supra,* this court quoted from *Fry* v. *United States,* 421 U.S. 542, at 547 (1975) saying:

> "While the Tenth Amendment has been characterized as a 'truism', stating merely that 'all is retained which has not been surrendered' *United States* v. *Darby,* 312 U.S. 100, 124 (1941) it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States integrity or their ability to function effectively in a federal system."

This court then proceeded to trace the development of this concept back through earlier decisions of this court by Chief Justice Chase. In *Texas* v. *White,* 7 Wall. 700, 725 (1869), Chief Justice Chase declared that "[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." In *Lane County* v. *Oregon,* 7 Wall. 71 (1869) his opinion of the Court stated:

> "Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the Confederate government which acted with powers, greatly restricted, only upon the States. But in many Articles of the Constitution the necessary existence of the States, and within their proper spheres, the independent authority of the States, is distinctly recognized." Id., at 76.

In *Metcalf & Eddy* v. *Mitchell,* 269 U.S. 514 (1926), the Court likewise observed that "neither government may destroy the other nor curtail in any substantial manner the exercise of its powers.

In *National League of Cities* v. *Usury, supra,* this court then reasoned that it had "repeatedly recognized that there are attributes of sovereignty attaching to every State government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner." (49 L. Ed. 2d 245 at 253)

This court then ruled that one such essential attribute of State sovereignty was the State's power to pay wages to those employed by the State. It is Appellant's position that there is functionally no difference between the payment of wages by the State to its employed and the payment of unemployment insurance benefits to its unemployed. Both are attributes of

State sovereignty, both are determined in part by local conditions and federal interference with either will impact adversely on the fiscal integrity of their respective funds. (See Appellant's Brief, p. 11)

To hold that 42 U.S.C. 501-503 and 26 U.S.C. 3304 require coverage in an area where none is intended or budgeted for by the State unemployment insurance program would constitute the type of intrusion upon the State's sovereignty that was forecast by the separate opinions of Mr. Justice McReynolds, Mr. Justice Sutherland with whom Mr. Justice Van Devanter concurred, and in the dissenting opinion of Mr. Justice Butler in *Chas. C. Steward Mach. Co.* v. *Davis, supra.* Mr. Justice Sutherland stated:

> "If we are to survive as the United States, the balance between the powers of the nation and those of the states must be maintained. There is a grave danger in permitting it to dip in either direction, danger—if there were no other—in the precedent thereby set for further departures from the equipoise. The threat implicit in the present encroachment (Social Security Act) upon the administrative functions of the states is that greater encroachments, and encroachments upon other functions, will follow." *Chas. C. Steward Mach. Co., supra,* at 616.

The Brief of the American Federation of Labor and Congress of Industrial Organizations as Amicus Curial recognizes that appellee's argument, that the Supremacy Clause of the U.S. Constitution has somehow preempted State law in the area of unemployment benefits, is not well taken. The AFL-CIO Brief at 16 stated that the Social Security Board declared shortly after the Act was passed, that paying benefits to persons in the appellee's class was not only permissible but preferable. This is consistent, however, with the Social Security Board's recognition that the states had complete freedom in structuring their own programs, as is evidenced by the cover page of the Social Security Board, *Draft Bills for State Unemployment Compensation of the Pooled Fund and Employer Reserve Account Types* (1936) stating:

> "This draft is merely suggestive . . . Therefore, it cannot properly be termed a 'model' bill or even a recommended bill. This is in keeping with the policy of the Social Security Board of recognizing that it is the final responsibility and right of each state to determine for itself just what type of legislation it desires and how it shall be drafted."

It is Appellant's firm belief that, if 42 U.S.C. 503 and 26 U.S.C. 3304 do, in fact, contradict 4141.29(D)(1)(a), Ohio Revised Code, that these federal statutes impair the sovereign function of the State and its instrumentalities who have made laws believing in their ability to do so and who should not now be subjected to suit for having done so. For this court to force the State of Ohio to pay unemployment benefits where none were intended by the State or Federal governments, and where the state law disqualifying the workers contravenes no fundamental right, would require constant intervention and policing by this court, a function better resolved by resort to the polls and not to the courts. [See *Williamson* v. *Lee Optical of Oklahoma,* 348 U.S. 483, 488, 75 S. Ct. 461, 465 (1955) rehearing denied 349 U.S. 925, 75 S. Ct. 657 (1955)]

C. Ohio's Statute 4141.29(D)(1)(a) does not offend the United States Constitution nor Deny Equal Protection on the Basis that it is Underinclusive or Results in some Inequality to a Particular Definite Class that has been Exempted from Unemployment Benefits by the State Legislature Under the General Welfare and Police Powers of the Ohio Constitution and the Powers Reserved to the States by the Tenth Amendment.

Almost immediately after the birth of the Unemployment Insurance Act, Federal Social Security Act of August 14, 1935 [49 Stat. at L. 620, Chapter 531, 42 U.S.C. chapter 7 (Supp.)] this honorable court was called upon to determine the constitutionality of the Federal-State system in two landmark

decisions. *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 57 S. Ct. 868, 81 L. Ed. 1245 (1937) and *Chas. C. Steward Machine Co.* v. *Davis*, 301 U.S. 548, 57 S. Ct. 883, 81 L. Ed. 1279 (1937).

This court laid down the following principles in *Carmichael, supra.*

1. States are free to select the class of workers who shall be eligible for benefits and is not bound to occupy the whole field.
2. Selection of classes, based upon any set of facts that would reasonably sustain the selection, must constitutionally be sustained.
3. Eligibility of benefits are entitled to the same considerations as to their validity as the choice of the subjects of the tax.
4. The legislature, not the courts, have the function of determining the distribution of the burden of the tax.
5. The unemployment compensation fund is administered in accordance with state law by the state commission.
6. Participation in the Federal-State Unemployment Fund does not strip the states of their sovereignty. The power to contract and the power to select appropriate agencies for execution of state policy are attributes of state sovereignty.
7. In establishing a system of unemployment benefits, the legislature may strike at the evils of unemployment where they are most practical and may exclude persons whose need is less or whose effective aid is attended by inconvenience which is greater.

During the years of the great depression, 1929 to 1936, the number of unemployed became a staggering burden upon the Federal government because the states were unable to afford the requisite relief. *Chas. C. Steward Mach. Co., supra,* at 586-587. The problem was national in scope and there was an urgent need for a Federal-State system to mitigate these catastrophic economic conditions.

"According to the President's budget message for the fiscal year 1938, the national government expended for public works and unemployment relief for the fiscal years 1934, 1935 and 1936, the stupendous total of $8,681,000,000. The parens patriae has many reasons—fiscal and economic as well as social and moral—for planning to mitigate disasters that bring these burdens in the train." *Chas. C. Steward Mach. Co., supra,* at 587.

Appellees point out that, if the Federal Government's motives for inducing the States to participate in unemployment compensation was to protect the fiscal integrity of the Federal Government's funds, is it no less a compelling reason for the State of Ohio to do likewise?

The Ohio legislature did not enact Section 4141.29 (D)(1)(a) without knowledge of the consequences it would have on the class of employees such as appellee's in the instant case. Prior to 1963, the law disqualified a claimant from receiving benefits if he became unemployed because of a labor dispute *at the factory, establishment or other premises at which he was employed.* Prior to 1963, Ohio courts, under the above language, disqualified claimants such as appellee's. *Cornell* v. *Bailey*, 163 Ohio St. 50, 125 N.E. 2d 323 (1955); *Adamski* v. *Bureau of Unemployment Comp.*, 108 Ohio App. 82, 155 N.E. 2d 518 (1959).

In 1963, the Supreme Court of Ohio again faced the issue of "functional integration" in *Abnie* v. *Ford Motor Co.*, 175 Ohio St. 273, 25 00 2d 110 (1963) but, in construing the Statute, the court held that "establishment" was meant to mean the physical location where claimants were employed; therefore, a strike at an out-of-state plant was not a strike at the Ohio plant so that the claimants' unemployment resulting from their layoff in Ohio was not due to a labor dispute at the factory, establishment or other premises at which they were employed. The Ohio Supreme Court followed rulings of sister state courts,

Michigan, in particular, *Chrysler Corporation* v. *Smith*, 297 Mich. 438, 298 N.W. 87 (1941), wherein the word *establishment* was taken to mean the distinct, physical place of business at which the claimants were employed and did not include the functional integration of various units of a complex industrial enterprise. The Ohio General Assembly immediately responded by amending the law after *Abnie, supra*, as follows:

> "... at any factory, establishment or other premises located in this or any other state and owned or operated by the employer by which he is or was last employed; and for so long as his employment is due to such labor dispute." (Underscore denotes 1963 Amendment)

The Ohio legislature cleared up the statutory construction problem and Ohio since then has consistently upheld the constitutionality of disqualifying workers who become unemployed through no fault of their own when their unemployment was due to a labor dispute in a functionally integrated plant. *Lena F. Barnes, et al.* v. *Brd. of Rev.*, 8 CCH, Unemployment Insurance Reports, Ohio New Matters, 38,550 (1972) Ohio followed *Abernathy* v. *Eastern Airlines*, 259 N.C. 190, 130 S.E. 2d 292 (1963) Cert. denied, U.S. Sup. Ct. 355 U.S. 161 (1963).

This court has recognized that the construction placed by the highest court of the state upon its statutes must be accepted by the Federal courts in determining the validity of such statutes under the Federal Constitution. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 31 S. Ct. 337 (1911). Mr. Justice Van Devanter delivered the opinion quoted below in pertinent part:

> "... it is necessary to inquire what construction has been put upon it by the highest court of the state, for that construction must be accepted by the courts of the United States ... when called upon to determine whether it violates any right secured by the Federal Constitution." (Citations omitted) *Lindsley, supra*, at 73.

Assuming that the district court considered the case law in Ohio concerning the instant case, we must then consider whether appellees could be excluded from receiving benefits by the Ohio legislature or whether as appellees contend, the law has no rational basis, is arbitrary and discriminatory and, therefore, consequently denies the equal protection of the laws as to those whom it affects.

This Court held in *Lindsley, supra*, at 78:

> "The rules by which this contention must be tested, as shown by repeated decisions of this court, are these: (1) the equal-protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore purely arbitrary. (2) A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or in practice it results in some inequality. (3) When the classification in such law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. (4) One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." (Citations omitted).

This Court has followed those principles in more recent cases. *Dandridge* v. *Williams*, 397 U.S. 485, 90 S. Ct. 1153 (1970) held that in "... the area of economics and social welfare, a state does not violate equal protection clause merely because the classifications made by its laws are imperfect." *Dandridge, supra*, at 485. The court also held that "mathematical nicety" is not required even if some "inequality" results. *Supra*, 485. (Citations omitted).

Appellants, from the inception of this litigation have steadfastly argued that, in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights, the states are free to legislate as to local needs which they believe will be in the best interests of their citizens.

Appellees have failed in their burden to substantiate their mere allegations that either (1) The Constitution supports the allegations contained in their original Complaint or (2) The Federal Government has preempted the State of Ohio in the field of administering the Ohio Unemployment Compensation Statutes. In addition, they have failed to cite any statute or language in the Social Security Act that is in violation of the Ohio Statute 4141.29(D)(1)(a).

In oral argument before the three-judge District Court, the following colloquium occurred:

> *Mr. Clyde:* The point has been raised that the Federal Government and the Labor Department or Social Security Administration do not dictate to the States procedures to follow in the implementation of the State Act. (Transcript, 45)
>
> *Judge Celebrezze:* Can you show me anywhere the Secretary of Labor issues regulations as to when and how benefits should be paid? (T-46)
>
> *Mr. Clyde:* I haven't yet, to the best of my knowledge—(T-46)
>
> *Judge Celebrezze:* Can you show me Federal legislation? (T-46)
>
> *Mr. Clyde:* There is Federal legislation, Your Honor.—(T-46)
>
> *Judge Celebrezze:* Any Federal legislation that deals primarily with the administrative provisions of who is entitled to benefits? (T-46)
>
> *Mr. Clyde:* In the states, no Federal regulations controlling states. There are those dealing with payments to Federal employees. (T-46)

As can be seen from the above answers of Appellees, they could not and have not to this date cited any law or federal conflict with the Ohio Statute. Appellees merely complain that Ohio law is *underinclusive.* They do not contend that the affected class has been treated unequal within the class.

Underinclusive is not a violation of the Constitution as this court held in *Geduldig* v. *Aiello,* 416 U.S. 496, 94 S. Ct. 2485, 41 L. Ed. 2d 256 (1947). The "deep pocket" rationale that Appellees are trying to thrust upon this court is not without its followers. Many unions also believe that the employers can simply raise the cost of goods to defray the increased costs. The fallacy of this theory is that this philosophy has in recent years (1) Increased inflation, (2) Caused many marginal businesses to close, (3) Allowed foreign competition to underbid U.S. companies, (4) Denies U.S. citizens products they might otherwise afford, (5) Has forced many companies to leave Ohio and the Northern states to relocate in the South and West because of more favorable taxes and lower or stable wage conditions, (6) Caused further unemployment as a result of plants closing, (7) Discourages company expansion, (8) Increases taxes, not only upon the employer but on the general public and (9) Is directly in conflict with our national policy of holding the line on price increases and stimulating the economy to provide more jobs.

It is not necessary to point out to this court what inflation has done to our grocery bill or the price of automobiles which has doubled in the past decade. Recent forecasts predict that the average Ford, Plymouth and Chevrolet will cost $8,000.00 by the year 1980—just three years hence. Not only this court but every citizen is alarmed at the shrinking purchasing power of their earnings which have not even remained even with inflation. Appellants, therefore, submit that the "deep pocket" theory is out of place in today's economic climate, if, in fact, it ever had any validity in our history.

D. Ohio's Statute 4141.29(D)(1)(a) as Applied to the Facts in the Instant Case Was Necessary to Preserve and Maintain the State's Duty of Neutrality in Labor Disputes.

Appellees agree (Br. 30-35) that labor dispute disqualifications operate rationally to preserve and maintain the state's duty of neutrality in labor disputes. This obligation flows from both the Social Security Act itself and from federal

labor policy. In section 903(a)(5) of the Social Security Act (now the Federal Unemployment Tax Act, 26 U.S.C. §§ 3301-3308), Congress provided that out-of-work claimants could not be denied benefits if they refused to accept employment where a "labor dispute" was in progress, or refused to work for wages and benefits below area standards, or declined to forego the federal right established just one month earlier to join a labor organization.[3] This provision was essential to prevent the unemployment compensation system from undermining collective bargaining (and union membership) rights established concurrently in the Wagner Act. Otherwise, employers could freely utilize out-of-work claimants as strike replacements, thereby using this federal-state program to tip the balance of economic power in their favor during labor disputes with their employees. See H. Doc. No. 81, 74th Cong., 1st Sess. 18 (1935); 79 Cong. Rec. 9271 (1935) (Remarks of Sen. Harrison). As the Supreme Court of California stated in *Matson Terminals, Inc.* v. *California Employment Comm.*, 24 Cal. 2d 697, 707 (1944):

> "The (Social Security) Act establishes a policy of neutrality in trade disputes by provisions that the payment or withholding of benefits should not be used to aid either party to a trade dispute. Thus, the provision disqualifying a worker who leaves his work because of a trade dispute § 56 (a) is balanced by the provision that other unemployed workers shall not be required to fill the vacated jobs or lose their right to unemployment insurance benefits

[3] This provision provides in *hace verba:*

> Compensation shall not be denied in such States to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (A) if the position offered is vacant due directly to a strike, lockout, or other labor dispute: (B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality: (C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization. 26 U.S.C. § 3304(a)(5).

> (§ 13 (b) (1). The payment of benefits to a claimant who leaves his work because of a trade dispute would conflict with this policy just as would the withholding of payments because a claimant refused to become a strikebreaker."[4]

Thus, Congress was aware of the potential for abuse by employers and employees inherent in this system and legislated a strict separation between the unemployment system and the system of free collective bargaining established within the statutory framework of the Wagner Act.

This *laissez faire* system imposes no obligation upon employers (subject to the jurisdiction of the National Labor Relations Board) or labor organizations to reach agreement on wages, hours, and working conditions. National labor policy embodied in federal labor laws mandates that the resolution of bargaining differences depends upon the balance of economic power existing between the contracting parties. Thus, national labor policy "leaves the adjustment of industrial relations to the free play of economic forces (and) seeks to assure that the play of these forces is truly free." *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 183 (1941). See also Cox, *Federalism in Labor Law*, 67 Harv. L. Rev. 1297, 1317 (1954). As Senator Taft stated during floor consideration of his amendments to the Wagner Act (93 Cong. Rec. 3951 (1947) [emphasis supplied]:

> "Basically, I believe that the committee feels, almost unanimously, that the solution of our labor problems must rest on a free economy and on *free collective bargaining.* The bill is certainly based upon that proposition. That means that we recognize freedom to strike when the question involved is the improvement of wages, hours, and

[4] See also *Miville* v. *Maine Empl. Sec. Comm'n*, 219 A. 2d 752, 753-54 (Me. 1966); *Sweeney* v. *Board of Rev., Div. of Empl. Sec.*, 43 N.J. 535, 539, 206 A. 2d 345, 347 (1965); *In re Steelman*, 219 N.C. 306, 310, 13 S.E. 2d 544, 547 (1941); *Marathon Elec. Mfg. Corp.* v. *Industrial Comm'n.* 269 Wis. 394, 404-05, 69 N.W. 2d 573, 579-80 (1955); *Saunders* v. *Maryland Unempl. Comp. Bd.*, 188 Md. 677, 682, 53 A. 2d 579, 581 (1947).

> working conditions, when a contract has expired and neither side is bound by a contract. We recognize that right in spite of the inconvenience, and in some cases perhaps danger, to the people of the United States which may result from the exercise of such right."

However, the exercise of these rights do not carry with them a guarantee of success or immunization from economic loss. This Court has repeatedly recognized this fundamental premise of national labor policy. "[T]he right to bargain collectively does not entail any 'right' to insist on one's position free from economic disadvantage." *Am. Ship Bldg.* v. *NLRB*, 380 U.S. 300, 309 (1965). "[T]here is nothing in the (National Labor Relations) Act which gives employees the right to insist on their contract demands, free from the sort of economic disadvantage which frequently attends bargaining disputes." Id. at 313. "[T]he (National Labor Relations) Act as presently drawn does not contemplate that unions will always be secure and able to achieve agreement even when their economic position is weak . . ." *Porter Co.* v. *NLRB*, 397 U.S. 99, 109 (1970).

Appellees contend Ohio's disqualification is overbroad and does not serve the legitimate and mandatory obligation of state neutrality in labor disputes. Appellees assume and argue (Br. 26) that the payment of unemployment compensation to the steelworkers would have no economic or other impact upon their bargaining strategy or any agreement ultimately reached with the Mineworkers Union. Appellees further argue that the steelworkers must receive compensation because they are not directly interested, participating in or financially supporting the Mineworkers' strike. In support of these contentions, Appellees and amicus AFL-CIO rely upon the proviso to the model bill drafted by the Social Security Board in 1936.

We contend, however, that Ohio's disqualification is consistent with the proviso, reflects the reality of the "ripple effect" of labor disputes in the present day economy, and prevents the unemployment compensation system from subsidizing employees when their employer is involved in labor disputes.

Of course, the model bill was advisory only and not binding on the participating states. 79 Cong. Rec. 5782 (1935) [Remarks of Cong. Cooper]. While the bill expressed the minimum obligation of neutrality, it did not prohibit states from *further* implementing this mandatory obligation consistent with the economic realities of integrated corporate structures existing in industrialized states. Thus, the fact that other states have not followed Ohio's lead does not necessarily mean that Ohio's disqualification is irrational or subject to invalidation.[5] Other states, differing geographically, climatically, or industrially have simply exercised their right, guaranteed by the 10th Amendment of the U.S. Constitution to formulate their own unemployment insurance programs.

Appellee's "no impact" argument also ignores the substantial wage replacement rate provided by unemployment compensation payments. A recent study of awards made nationwide during 1970 concluded that "benefits generally replace *two-thirds* (⅔) or more of lost net income." (Emphasis in original) Feldstein, "Unemployment Compensation: Adverse Incentives and Distributional Anomalies", 27 National Tax J. 231 (1974). Receipt of such generous benefits would tend to discourage the exertion of any pressure from the Steelworkers

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[5] We note, contrary to Appellees, Congress did *not* permit the same degree of State experimentation with the scope of the duty of neutrality as it did with other aspects of the program. Section 903(a) represents an express mandate of neutrality, and there is no suggestion in the legislative materials that states would be free to ignore this directive in establishing eligibility. Rather, this was one of the minimum federal controls designed to insure that funds would go only to the relief of the actually unemployed. 79 Cong. Rec. 5782 (1935) (Remarks of Cong. Cooper); 79 Cong. Rec. 9284 (1935) (Remarks of Sen. Wagner). The states were left free only to require employee as well as employer contributions, to determine compensation rates, waiting periods and duration of benefits, and whether funds would be in pooled, individual or segregated accounts. S. Rep. No. 628, 74th Cong., 1st Sess. 13-14 (1935).

upon the Mineworkers to compromise or withdraw unrealistic bargaining demands and thus create a negotiated settlement which would end the Mineworkers' strike and enable the Steelworkers to return to work. Similarly, benefit availability for fellow workers would tend to decide close questions in favor of a strike, because economic leverage against an integrated employer could be obtained by forcing the shutdown of other segments of the steel production process without forcing these workers to undergo any appreciable economic deprivation from a layoff. And, of course, the direct cost to the employers in increased unemployment taxes would necessarily affect the employer's bargaining strategy regardless of whether benefits were going to the striking bargaining unit or to other employees. Cf. *Super Tire Eng. Co.*, v. *McCorkle*, 416 U.S. 115, 124 (1974) [availability of state welfare assistance pervades every incipient labor contract].

Moreover, it cannot reasonably be assumed as do Appellees and *amicus* AFL-CIO that the laid off Steelworkers are not directly interested in the labor dispute between their employer and the Mineworkers. Economic concessions granted the Mineworkers in their collective bargaining contract would not be ignored by the Steelworkers in planning their own demands when their contract expires. It is a common experience that employers who bargain with more than one labor organization must be conscious of the fact that these labor organizations commonly coordinate bargaining demands and at least insist on parity with any economic benefits granted another union. Thus, the fact that the Steelworkers are not members of the Mineworkers' bargaining unit and not employed at the same premises is not determinative of their interest. Here, both labor organizations bargain with the *same* employers, and it is likely that all employees, regardless of their union affiliation or place of work, will realize, at least to some extent, the economic benefits obtained by any one employee.

Nor is it as clear as Appellees and *amicus* AFL-CIO would have us believe, that the Steelworkers are not of the "same grade or class" as the Mineworkers. Superficially, they do perform separate work, but the work is an integral part of the on-going steel production process, of the same employers. And as the facts here demonstrate, steel production is largely dependent upon coal processing—in these employers' integrated production processes.

Ohio's willingness to adapt its obligation of neutrality in labor disputes to the changing forms of economic activity which blanket Ohio's economy is supported by Congress' broad conception of "a labor dispute." Twice, Congress has enacted definitions of "labor dispute" which extend its scope beyond common law employer-employee relationships. In 1932, Congress adopted this definition to restrict federal court intervention in such disputes.[6] And in 1935, in the Wagner Act, Congress reenacted this definition to extend broad protection to all persons not just employees of the involved employer.[7] These definitions reflect Congressional awareness of the "ripple effect" of labor disputes which transcend employment relation-

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[6] Section 13 (c) [29 U.S.C. § 113 (c)] of the Norris-La Guardia defines a "labor dispute" as any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

[7] Section 2(9) of the Labor-Management Relations Act provides: The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment regardless of whether the disputants stand in the proximate relation of employer and employee. 29 USC. § 152 (9).

ships and also the reality that employees frequently have common interests and goals and engage in supportive activities like picketing and handbilling even without the prospect of direct and immediate benefit to themselves. Here, of course, the interest of Steelworkers in the labor dispute between the Mineworkers and their employers is more immediate and less tangential than that of persons who are not employed by the same employer. We contend Ohio has reasonably taken into account this reality of current industrial relations in extending its disqualification of the same employer to include workers laid off as a result of a labor dispute.[8]

Finally, Appellees contend (Br. 18-22, 42-44) that Ohio's disqualification is overbroad by analogy to the cases holding that uniform pregnancy leave requirements violate the equal protection and due process clauses of the Fourteenth Amendment. These cases provide no analogy to the disqualification here because those regulations were based upon an irrefutable presumption that women could not adequately perform their employment duties beyond a certain period in their pregnancy. See, e.g., *Cleveland Bd. of Education* v. *LaFleur*, 414 U.S. 632 (1974). Ohio's disqualification in contrast is based upon the limited purpose of the Social Security Act, and the federally imposed duty of neutrality in labor disputes. The disqualification here is not just an arbitrary line drawn by the Ohio legislature, but one which flows from full implementation of a national democratic and representative censuses legislated by Congress. While it is true, as amicus AFL-CIO contend, (Br. 16-17) that the Fourteenth Amendment applies to federal as well as state legislation, we contend that it is not irrational under the relaxed scrutiny standard applicable to this case, for Congress to have directed the states to harmonize their unemployment compensation programs with the free collective bargaining policy of federal labor policy by incorporating a duty of neutrality in labor disputes into eligibility under the Social Security Act. It is also essential for the states, particularly industrial states like Ohio, to conserve funds for those actually without jobs in a time when unemployment rates account for at least 7.9% of the workforce. Indeed, many states have had to borrow federal money (which must be repaid) to meet the growing demand from those whom the program was intended to aid. Congress has set up two systems—collective bargaining to aid the underemployed worker, and unemployment compensation to aid the unemployed worker while he actively seeks to reenter the workforce.

[8] To the extent the British Unemployment Compensation does not follow this approach, we respectfully submit this is because British labor relations are not premised upon a system of free collective bargaining. We note, however, that British decisions recognize that employees locked out by an employer in support of a wholly separate employer's bargaining position would *not* be eligible for unemployment compensation payments. See Umpire Decision No. 5117, April 19, 1928 quoted in *In re North River Logging Co.*, Wash. 130 P. 2d 64, 66 (1942)

Appellees also argue (Br. 35) that Ohio's legitimate interest in protecting the fiscal integrity of its unemployment compensation fund does not require denial of payments to persons uninterested and uninvolved in a labor dispute. We have demonstrated above why the claimants here are not wholly uninvolved or disinterested in the labor dispute which led to their layoff because this dispute involves their own employers. Accordingly, they can properly be disqualified from unemployment compensation even under the provision to the model bill.

In any event, the demands of fiscal integrity operate to limit available funds to those actually out of work, even when payments might not directly undermine the employer's bargaining position. As the Court stated in *Dandridge* v. *Williams*, 397 U.S. 471, 479 (1970):

> "Given Maryland's finite resources, its choice is either to support some families adequately and others less adequately, or not to give sufficient support to any family."

Ohio is in the same position here, particularly during this period of continuing economic recession. Ohio cannot reduce the level of compensation without denying all claimants sufficient support. Thus, Ohio cannot expand its fund except by raising the tax on employers. Such a raise may well be counterproductive for marginal employers whose business could not afford increased taxation. This, in turn, would reduce available jobs and limit economic growth toward additional jobs, thereby increasing demands upon Ohio's unemployment fund.

Last term the Court held that the city of Charlotte could properly decline to withhold dues for city employees who were union members even when the city withheld amounts for other organizations. *City of Charlotte* v. *Firefighters*, 426 U.S. 283 (1976). The court without dissent upheld the city's decision over challenge under the Equal Protection Clause for the sole reason that the evidence showed "that it would be unduly burdensome and expensive for it to withhold money for every organization or person that requested it . . ." 426 U.S. at 287. Similarly, here Ohio, consistent with the limited purpose of the Social Security Act, must take in account the actual resources of its fund in order to meet the rising burden of those without jobs, imposed by the nation's continuing economic instability. See Manpower Admin. U.S. Debt of Labor Comparison of State Unemployment Ins. Laws (3d rev. ed. Sept. 1, 1973).[9]

[9] This case raises a substantial and significant "case and controversy" within the scope of Article III of the U.S. Constitution notwithstanding the December, 1975 Amendment to the Ohio Unemployment Compensation Act. North Carolina's disqualification provision parallels Ohio's and because of rising demands from the nation's unemployed other jurisdictions may well be eager to follow the lead of these two states if such provisions are beyond constitutional challenge.

E. Disqualification Based Upon Fault or No Fault Does Not Violate Either the Equal Protection or Due Process Clause of the United States Constitution.

The basic principles set forth by this court in *Chas. C. Steward Mach. Co., supra,* and *Carmichael* v. *Southern Coal & Coke Co., supra,* relating to classifications are equally as sound today as they were in 1935. The subject matter of taxation and the distribution of the benefits are a function of the legislature. It is the responsibility of the legislature to determine the local needs and general welfare of their constituency and a classification should be upheld whenever possible by the courts. Appellants agree that in the judicial process of construing legislation the courts take a long look at the purposes to be accomplished. The Congress, using the English Act of 1911 as a guide, passed the Federal Social Security Act of 1935.

One of its major purposes was to give aid, to be administered under State law through State agencies, to those out of work through no fault of their own when unemployment was due to 'fluctuations in trade'. Nebraska Law Review, Vol. 37, No. 4, June 1958.

Both the Federal and State Acts were passed at a time when the country appeared to be in the initial stages of recovery from a disastrous depression. The intent was to accumulate, by Federal and State employers tax, an insurance fund which in time of need would tide over workers temporarily laid off because work was not available. At the time the Act was passed, it is doubtful that employers contemplated their tax monies would be used to encourage any work stoppage resulting from a labor dispute. It is also doubtful, in all probability, that the framers of the Act or the States themselves projected their vision into the future so as to foresee a work stoppage by a few specialists in a multi-plant functionally integrated with other units that could affect the jobs of hundreds or thousands as a result of a labor dispute at one or more of the dependent

subsidiaries. *Abernathy* v. *Eastern Airlines*, (1963) 259 N.C. 190, 130 S.E. 2d 292 Cert. denied U.S. Sup. Ct. 375 U.S. 161 (1963). Neither was it contemplated that the insurance fund could be depleted by workers who were not actually participating in the strike but were out of work as a result of that strike.

The background of Labor dispute disqualifications was discussed in *Nebraska Law Review*, Vol. 37, No. 4, supra, which contained the following:

> "(1) It was not considered wise to permit the fund to be used to finance or subsidize workers engaged in trade disputes, because it was feared that if benefits were available to all workers unemployed as a result of a trade dispute, they would be encouraged to suspend work in furtherance of their position in the dispute, thereby imposing an unfair burden upon the employer, and working injury upon the national economy and upon the public at large; (2) because there had been no previous experience it was feared that payment of benefits when unemployment was due to a labor dispute might cause a severe drain upon the funds available, thereby defeating the primary purpose for which the fund was created—the payment of benefits when unemployment was due to 'fluctuations in trade.' "

Further support for Appellant's proposition that the purpose of the Social Security Act of 1935 was primarily concerned with loss of business not the paying out of benefits to those out of work due to a labor dispute can be found in this court's opinion in *Carmichael* v. *Southern Coal & Coke Co., supra*, at 515:

> "Detailed accounts of the problem and its social and economic consequences, to be found in public reports of the expenditure of relief funds, and in studies of many observers, afford a basis for the legislative judgment. It suffices to say that they show that unemployment apparently has become a permanent incident of our industrial system; that it varies, in extent and intensity, with fluctuations in the volume of seasonal business and with the business cycle. It is dependent, with special and unpredictable manifestations, upon technological changes and advances in methods of manufacturing, upon changing demands for manufactured products—dictated by changes in fashion or the creation of desirable substitutes, and upon the establishment of new sources of competition."

From the above language it is apparent that unemployment as a result in "fluctuations in trade" was an evil that was everyone's concern in 1935. There is no reference to labor disputes as a cause of unemployment. The concern was that during the depression there were no jobs and the unemployed needed help. The states enacted statutes expressly prohibiting payment of benefits to those unemployed due to a labor dispute. The reasons vary—(1) State neutrality (2) Preservation of the Fund (3) In order not to finance a labor dispute (4) A worker is not unemployed as a result of a labor dispute (5) Protect an employer from having to finance a strike against himself (6) The possibility of prolonging the strike—the list goes into infinity. The Illinois Court in *Buchholz* v. *Cummings*, (1955) 6 Ill. 2d 382, 128 N.E. 2d 900 pointed out that by the labor dispute disqualification provision of their statute, the Illinois legislature adopted the policy that the state should not, by payment of unemployment compensation, assist one party to a labor dispute, *regardless of fault*, and the state should not take sides but remain neutral, even though the court recognized that the labor dispute clause was a departure from the general idea of relief from involuntary unemployment.

In *Kelly* v. *Catherwood*, (1969) 33 App. Div. 2d 830, NY 2d 741, affd 29 NY 877, 328 NYS 2d 442, N.E. 2d 649, the court not only pointed out the states interest of neutrality, but to avoid the imputation that a strike may be financed through unemployment insurance, noting that benefits were paid from funds which were derived solely from employer contributions and that to require employers to subsidize wages lost by employees who were on strike or who had been locked out would subvert the delicate balance of power existing between labor and management upon which the collective bargaining process depended. See also *Marathon Electric Mfg. Corp.* v.

Industrial Comm. (1955) 269 Wis. 394, 69 NW 2d 573, reh. den. 269 Wis. 411, 70 NW 2d 576. This Court held in *Carmichael* v. *Southern Coal & Coke Co., supra,* 301 U.S. at 518 (14) that the Alabama Unemployment Compensation Act of 1936 was constitutional even though it was not limited to indigents or because it extended to some less deserving than others, such as those *discharged for misconduct.* Fault was an issue since plaintiffs believed that the Alabama law allowing benefits to those that became unemployed through their own misdeeds was not for a public purpose, hence unconstitutional.

Recognizing that the general purpose of the unemployment compensation statutes were designed to relieve involuntary unemployment, Appellants point out that there are other disqualifications based upon no fault. Claimants performing jury duty were held not available for work and were denied benefits. *Sincerbox, In re,* 24 App. Div. 811 (14), 263 N.Y.S. (2d) 907 (1965); *Messenger* v. *Administrator,* Judgment of the Superior Ct. Hartford County, No. 100225, Dec. 30, 1954, 3 CCH, Unemp. Insurance Reports, Connecticut—New Matters, 1952-1965 Transfer Binder, 10,680. Many states disqualify benefits to those workers who become unemployed due to an illness or injury serious enough to cause a lay-off. *Wolpers* v. *UCC,* 353 Mo. 1067, 186 S.W. 2d, 440 (1945); *State of W. Va.* v. *Hix,* 132 W. Va. 516, 54 S.E. 2d 198 (1949); *D'Yantone* v. *Bd. of Rev.,* 159 Pa. Super. 15, 46 A. 2d 525 (1946). Pregnancy which results in unemployment is held a withdrawal from the labor market. *Flannick* v. *Bd. of Rev.,* 168 Pa. Super. 606, 82 A. 2d 671 (1951); *O'Neil, In re,* 30 App. Div. (2d) 1012 (26), 294 N.Y.S. 2d 207 (1968). A claimant whose physical condition prevented her from riding on buses or subways was considered unavailable because of the limitation on opportunities to obtain employment. *In re Fico,* 29 App. Div. 1011 (12), 289 N.Y.S. 2d 249 (1958). Moving to an area of high unemployment disqualifies a claimant from receiving benefits. *Wadlington* v. *Mindes, et al.,* 4 CCH —Unemployment Insurance Reports, Illinois—New Matters, 10,653 (1970)

Other disqualifications arise from refusal to work a particular shift, travel, unavailable for work due to lack of transportation, leaving employment because of family or marital reasons, illness in the family, spouse involuntarily leaving work because her husband was transferred, refusal to work on a particular day for religious reasons and in some cases refusing to accept work due to lower wages. The above disqualifications are just a few of the cases where involuntary employment results in a denial of benefits. Each state has specific laws with various disqualifying provisions. The most that can be said on the subject is that there is no federal law that sets forth the limits that a state legislature may place on the payment of benefits or the requirements the legislature places on eligibility. The no-fault provision in the Ohio law is constitutional and is within the police power of the State.

F. Preservation of the State Unemployment Account is Required by the Social Security Act.

Under 26 U.S.C., Section 3302, the state is obligated to maintain sufficient funds to administer the Unemployment Compensation Program. If the fund is depleted and it becomes necessary to borrow from the Federal Reserve Account, repayment must be made within three years or the state employers subject to FUTA are subject to a reduction of credit towards the state tax up to 15 per cent. The Secretary of Labor, pursuant to Public Law 94-45, Title I, Section 110 (G) (1) may render that subsection inapplicable if he is satisfied that the state has taken adequate steps to ensure the restoration of fiscal soundness of the State Fund. The Section governing repayment of loans is quoted in pertinent part below:

> "Sec. 110. (b) (1) the amendment made by subsection (a), shall not be applicable in the case of any State unless the Secretary of Labor finds that such State has studied and taken appropriate action with respect to the financing of its unemployment programs so as substantially to accomplish the purpose of restoring the fiscal soundness of

> the State's unemployment account in the Unemployment Trust Fund and permitting the repayment within a reasonable time of any advances made to such account under title XII of the Social Security Act. For purposes of the preceding sentence, appropriate action with respect to the financing of a State's unemployment programs means an increase in the State's unemployment tax rate, an increase in the State's unemployment tax base, a change in the experience rating formulas, or a combination thereof."

As seen in the above Section, the states by appropriate action must (1) increase the state tax rate on the employer, (2) increase the tax base, (3) change the employer's experience rating or (4) any combination of the above.

It seems incongruous to Appellants that the Federal Government could mandate the State to maintain a sound fiscal policy and also dictate who shall be eligible for benefits under a state unemployment plan as suggested by Appellees.

The State has an additional interest in preserving the fund in that the capital improvement funds cannot be used for expansion and building new local offices as required to meet the needs of its citizens if the state is reduced to borrowing from the Federal Reserve fund. Ohio expansion plans presently being developed calls for thirteen new claims offices to be constructed in the near future.

G. State Substantive Law Required that U.S. Steel and Republic Steel be Made Parties.

As this court is well aware, the decision of *Erie Railroad Co.* v. *Tompkins*, 58 S. Ct. 817, 304 U.S. 64 (1938) stands for the proposition that federal courts must apply the same rules of substantive law as the state courts of the state in which the district court is sitting. In the instant case, the three-judge district court failed to do so.

Not only did the three-judge district court fail to apply the substantive law of the state of Ohio with respect to Section 4141.29 (d)(1)(a) but the lower court ignored the fact that the state of Ohio may, for purposes of its state unemployment programs, determine who shall be a party necessary for complete litigation of an unemployment claim.

Rule 19(a) of the Federal Rules of Civil Procedure states:

> "(a) PERSONS TO BE JOINED IF FEASIBLE. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action *shall be* joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, *the court shall order that he be made a party.* If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action." (Emphasis added)

In the instant case, the failure to join U.S. Steel and Republic Steel might well mean that any judgment rendered in this case will not bind them. This could mean that subsequent suits could follow involving these employers should it be deemed necessary to debit their Unemployment Insurance accounts for benefit payments.

So strong is the necessity for joining the employer in a legal action for unemployment benefits that it has been statutorily defined by the General Assembly of Ohio. Although Section 4141.01 (I), Ohio Revised Code, uses the term "interested party" rather than necessary or indispensable party, the facts in the instant case are sufficient to trigger the operation of Rule 19(a) and (b) Federal Rules of Civil Procedure. Section 4141.01 I states:

> " 'Interested party' means the administrator and any party to whom notice of a determination of an application for benefit rights or a claim for benefits is required to be given under section 4141.28 of the Revised Code."

Section 4141.28(E)(3) of the Revised Code states:

"(3) The administrator on receipt of such eligibility notice shall determine whether such notice was timely filed and whether it contains specific facts which would affect the claimant's eligibility for benefits for the week in question and for subsequent weeks to which the same eligibility issue applies. In the event both such determinations are in the affirmative and unless a prior determination on the same eligibility issue has become final, *the employer shall become an interested party* with respect to such week or weeks. In such event the administrator or his deputy shall consider such information, together with other facts found by him and, *after giving notice to the interested parties* and informing them of their right to be present at a pre-determination fact-finding interview, conducted as described in division (B) of this section, shall determine whether such claim shall be allowed, and shall mail notice of such determination to the notifying employer and to the claimant. If the determination disallows benefits for any week in question, the payment of benefits in respect to that week shall be withheld pending further appeal." (Emphasis added)

Thus, under the substantive law of Ohio, a claimant's employer, in this case, U.S. Steel or Republic Steel, is, for purposes of litigation, an indispensable party on a par with the Administrator of the Ohio Bureau of Employment Services, and the defect of failing to join them is so basic that it may be raised even at this point. In *McShan* v. *Sherill,* 283 F. 2d 462, 464 (C.A. 9th, 1960), the defendant-appellants did not complain of the plaintiff-appellees' failure to join a party until *after* the trial. The Appellate Court, in remanding to the district court, stated:

> "Appellees complain of appellants' delay in raising the objection (to lack of joinder) and the nature of the evidence supporting it. The absence of indispensable parties can be raised at any time, however, even by the appellate court on its own motion."[10]

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[10] For additional authority, see 3A J. Moore, Federal Practice, par. 19.19 at 2582 n. 10, 11.

H. The Workers Here in Issue Would be Disqualified Under the Present Ohio Law and Under the Laws of Other States.

As this court is well aware, Section 4141.29(D)(1)(a) was amended effective 2/7/75 to read:

> "(D) Notwithstanding division (A) of this section, no individuals may serve a waiting period or be paid benefits under the following conditions:
>
> (1) For any week with respect to which the administrator finds that:
>
> (a) His unemploymnet was due to a labor dispute other than a lockout at any factory, establishment, or other premises located in this or any other state and owned or operated by the employer by which he is or was last employed; and for so long as his unemployment is due to such labor dispute. No individual shall be disqualified under this provision if: (i) HIS EMPLOYMENT WAS WITH SUCH EMPLOYER AT ANY FACTORY, ESTABLISHMENT, OR PREMISES LOCATED IN THIS STATE, OWNED OR OPERATED BY SUCH EMPLOYER, OTHER THAN THE FACTORY, ESTABLISHMENT, OR PREMISES AT WHICH THE LABOR DISPUTE EXISTS, IF IT IS SHOWN THAT HE IS NOT FINANCING, PARTICIPATING IN, OR DIRECTLY INTERESTED IN SUCH LABOR DISPUTE, OR; (ii) his employment was with an employer not involved in the labor dispute but whose place of business was located within the same premises as the employer engaged in the dispute, *unless his employer is a wholly owned subsidiary of the employer engaged in the dispute,* or unless he actively participates in or voluntarily stops working because of such dispute. If it is established that the claimant was laid off for an indefinite period and not recalled to work prior to the dispute, or was separated by the employer prior to the dispute for reasons other than the labor dispute, or that he obtained a bona fide job with another employer while the dispute was still in progress, such labor dispute shall not render the employee ineligible for benefits." (Emphasis added)

Thus, even under the present law there exists a doubt that Appellee herein would be entitled to benefits. The above quoted Amendment provides that workers would be disqualified from benefits if they were employed in a wholly owned subsidiary of the employer engaged in the dispute, even though they are not financing, participating in, or directly interested in such labor dispute. The amendment to Section 4141.29 (D)(1)(a) thus changes nothing and indicates no shift in the thinking of the Ohio General Assembly on these facts.

Further, the workers in this case would be disqualified in other states, had they been employed there, in spite of the fact that other states may not have a provision identical to Ohio's. Examples of this can be found as in *Mountain States Tel. & Tel. Co.* v. *Sakrison* (1950) 71 Ariz. 219, 225 P. 2d 707 wherein all facilities in and out of the State were considered one facility and benefits were denied to all employees. In *Re Persons Employed by St. Paul & T. Lumber Co.* (1941) 7 Wash. 2d 580, 110 P. 2d 877, the court denied benefits to employees of a subcontractor who had to lay off his employees due to a strike of his principle even though the sub-contractor's employees were not participating, financing or interested in the labot dispute and were not employees of the struck employer. (See also *Local Union No. 11* v. *Gordon* (1947) 396 Ill. 293, 71 N.E. 2d 637). In *Bonaventura* v. Catherwood (1969) 32 App. Div. 2d, (NY) 869, 301 NYS 2d 229 truck drivers for a construction contractor were denied benefits because the contractor's operating engineers were on strike. This was because the New York statute covered unemployment resulting from a strike or other industrial controversy, regardless of the claimants' individual participation, financing, aid, or interest in the outcome.

Appellees do not point out that, even in the states that allow benefits in various forms of labor disputes, nearly every state has some sort of disqualification in the waiting weeks which vary from one to nine weeks or more. In these cases, many employees never receive benefits because, in many cases,

the strike is over before the State pays out benefits. This is just another method of preserving their funds; another variation on the theme of disqualifications under the various state laws. Thus, the questions raised by this appeal are ripe, justiciable and not moot.

CONCLUSION

For the above reasons, it is respectfully requested that this Honorable Court reverse the decision of the three judge district court or, in the alternative, that this Honorable Court reverse the decision of the three judge district court and remand this action for further evidentiary hearings.

Respectfully submitted,

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